(5) (4)

Nos. 84-835 and 84-776

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,
Petitioner

v.

RICHARD NASH,
Respondent

PHILIP CARCHMAN,
Petitioner

v.

RICHARD NASH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING SUPPORTING REVERSAL

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QUESTION PRESENTED FOR REVIEW

WHETHER ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS APPLIES TO A DETAINER BASED UPON A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE, WHICH SENTENCE WAS ENTERED AFTER CONVICTION, BY INTERPRETING THE PHRASE "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" TO ENCOMPASS SUCH A DETAINER?

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SUPPORTING REVERSAL

INTEREST OF AMICI STATES

This case presents the question of whether a prisoner's right to speedy disposition of certain detainers guaranteed by the Interstate Agreement on Detainers (Agreement) extends to a detainer based on a charge of violation of a probationary sentence.[1] Article III(a) of the Agreement obligates a prosecutor to arrange the return an out-of-state prisoner for trial within 180 days of the prisoner's delivery of a written request for final disposition of "any untried indictment, information or complaint." (18 U.S.C. App. (1976)).

[1]Previously in an action brought pursuant to the Civil Rights Act, 42 U.S.C. §§1981, 1983 (1976) the Court has found that the Agreement is a uniform compact approved by Congress and as such its construction presents a federal question. Cuyler v. Adams, 449 U.S. 433, 438 (1981).

Article V(c) provides that failure to accept temporary custody or failure to bring the prisoner to trial within the time provided obligates the court in which the charges are pending to dismiss the untried charges with prejudice and to order that any detainer based on the charges have no effect.

The Court of Appeals held that the Agreement was applicable to a detainer based on a charge of violation of a probationary sentence where the probationary sentence was imposed after conviction.[2] Based on this interpretation, the Court of Appeals affirmed the district court's order granting a

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[2]In the instant case Nash, pursuant to a plea bargain, pled guilty to the crimes of breaking and entering with intent to rape and assault with intent to rape. He received a sentence of 36 months, 24 months suspended with two years probation. Pet. App 77, 78, 102.

writ of habeas corpus.[3] Amici States, all signatories to the Agreement, submit that the Third Circuit's opinion creates a new and substantial administrative and fiscal burden on their limited personnel

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[3]This Court, while finding the Agreement presented a federal question under 42 U.S.C. §§1981, 1983 (1983), Adams, supra., has never addressed whether the Agreement presents a federal question when the jurisdiction of the federal courts is being invoked pursuant to the Habeas Corpus statutes, 28 U.S.C. §§ 2241, 2254, 2255, (1976)). While the various courts of appeals which have addressed the availability of federal collateral review for violations of the Agreement post-Adams are in accord that the Agreement is one of the "laws...of the United States" contemplated by 28 U.S.C. §§2241, there is a split of opinion as to whether failure to provide the process set forth in the Agreement is an "error of law [and is] 'a fundamental defect which inherently results in a complete miscarriage of justice'", Davis v. United States, 417 U.S. 333, 346 (1974). Compare: Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.) cert. denied, ___ U.S. ___, 51 L.W. 3902

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and financial resources without providing the salutory effect perceived to exist by the Court of Appeals and that the decision of the Third Circuit runs counter to the plain meaning of the language of the statute and to the available legislative

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FOOTNOTE CONTINUED

(June 20, 1983); Johnson v. Williams, 666 F.2d 842, 844 n. 1 (3d Cir. 1981); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980), Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert denied, 455 U.S. 910 (1982); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977); Fasano v. Hall, 615 F.2d 555, 558 (1st Cir.) cert. denied, 449 U.S. 867 (1980), Neville v. Cavanagh, 611 F.2d 673, 676 (7th Cir. 1979) (dictum) cert. denied 446 U.S. 908 (1980), Rivera v. Harris, 643 F.2d 86, 90 n. 2 (2nd Cir.) rev'd on other grounds, 454 U.S. 339 (1981); and United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980).

history.[4] Accordingly, amici have a substantial interest in the outcome of this case.

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[4]No exact tally of the number of prisoners confined under sentence in one signatory state with detainers lodged by another signatory state for violation of either a probationary sentence or the conditions of parole was available as none of the states routinely tabulates such information. However, the National Crimes Information Center of the United States Department of Justice informs us that as of February 5, 1985, 15,598 persons were listed as being sought by the 48 signatory states and the District of Columbia for violation of parole and 27,177 persons were listed as being sought by the same jurisdictions for violation of probationary sentences. Amici believe a significant number of this total will ultimately be located through arrest for new crimes committed in another signatory jurisdiction and those new charges will result in conviction and sentencing.

Summary of Argument

It was the unfulfilled responsibility of the court below to construe the Agreement consistent with the plain meaning of the statute aided by whatever clearly expressed legislative intent was found to exist. To the contrary, the Third Circuit assumed a policy making role and in so doing oversimplified the nature of the policy interests at stake.

Amici submit that the language of the statute, the available legislative history and its purpose read in conjunction do not reveal a clearly expressed intent contrary to the traditional definitions of "untried indictment, information or complaint". There is no constitutional obligation to quickly resolve these detainers. For such an obligation to exist the States must be found to have freely and knowingly agreed to it. The conclusion of each State court which has ruled on the issue that detainers for

violations of a probationary sentence are outside the scope of the Agreement rebuts any assumption to the contrary. The interpretation by the courts below that the scope of the Agreement is controlled by a general definition of the word detainers renders the critical limiting phrase surplusage. Such an interpretation is contrary to the rules for proper statutory construction.

Lastly, the Court of Appeals failed to weigh all policy considerations and premised its analysis on misassumptions of fact. Given the predictive nature of the hearing, amici believe that an early resolution of the detainer when the violator has had no time to exhibit reformed behavior will militate both in favor of revocation and the longest sentence permitted. To force such action serves neither the interests of society nor the prisoner.

ARGUMENT

A DETAINER FOR A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE IS NOT A DETAINER FOR AN "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" AND THE AGREEMENT ON DETAINERS IS NOT APPLICABLE TO SUCH A DETAINER.

In its decision in this case the Third Circuit has abandoned its role as interpreter of statutes in favor of the policy-making role usually thought to reside in the legislatures of the States and Congress. The Court, frankly and with little hesitation, rejected the "technical" construction of the Agreement arrived at by the Ninth Circuit and each of the state courts which have addressed the question.[5] In so doing, the Court

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[5]Four state courts of last resort have determined that the Agreement is inapplicable to a detainer for violation of a probationary sentence: Clipper v. Maryland, 295 Md. 303, 455 A.2d 973 (1983); Padilla v. Arkansas, 279 Ark. 100, 648 S.W.2d 797 (1983); State v.

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of Appeals not only overstepped the proper bounds of its function in resolving disputes - it also oversimplified the nature of the policy interests at stake. Because the decision below failed to properly heed the limits of the precise statutory language under review, it must be reversed.

Amici submit that, in determining the intended scope of the Agreement the Court of Appeals should have looked first

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FOOTNOTE CONTINUED

Knowles, 275 S.C. 312, 270 S.E. 2d 133 (1980), and Suggs v. Hopper, 234 Ga. 242, 215 S.E. 2d 246 (1975). In addition, three state intermediate courts have held likewise: People ex rel. Capalongo v. Howard, 87 App. Div. 2d 242, 453 N.Y.S. 2d 45 (N.Y. App. Div. 1982); People v. Jackson, 626 P.2d 723 (Colo. App. 1981); and Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976).

at its language.[6] Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1985). "[W]hen aid to construction of the meaning of words, as used in statute, is available there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'".

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[6]The relevant portion of Article III of the Agreement provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint....

18 U.S.C. App. (1976).

Cass v. United States, 417 U.S. 72, 78-79 (1974) quoting United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544, reh. denied, 311 U.S. 724 (1940). But "[i]f the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.' [United States v. Turkette, 452 U.S. 576, 580 (1981)], quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)" Dickerson 460 U.S., at 110. The task before the Court of Appeals was "to interpret the words of [the statute] in light of the purposes [the State legislatures and] Congress sought to serve." Ibid, quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

Here the Court of Appeals appears to have concluded implicitly that the

language of the Agreement, when compared with the purposes of the Agreement and the scant available history, rendered the language sufficiently ambiguous to reject the traditional, or as termed by the circuit court "technical", meaning of the phrase "untried indictment, information, or complaint" found throughout the Agreement in favor of an expanded definition to include charges of violation of probationary sentences.[7] The language of the statute, its legislative history and its purpose read in conjunction do not reveal a clearly expressed

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[7]The commentary relied upon was published in 1956 by the Council of State Governments and included in their publication of "Suggested State Legislative Program for 1957", pp 74-76 (1956). United States v. Mauro, 436 U.S. 340, 359 (1978). It should be noted that the type of probation involved is important to the position of amici. Their position does not relate to periods of probation imposed without verdict as part of a

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legislative intent contrary to the traditional definition found appropriate by the Court of Appeals for the Ninth Circuit in United States v. Roach, 745 F.2d 1252 (9th Cir. 1984)(probation detainer) and Hopper v. United States Parole Commission, 702 F.2d 842 (9th Cir. 1983) (parole violation).

Article I of the Agreement states the purpose of its enactment: "[I]t is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition

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FOOTNOTE CONTINUED

prosecution diversion program. In such situations the accused foregoes his right to a speedy trial in consideration for the prosecutor's promise to nolle pros the charges after the accused has satisfactorily completed a period of supervision. If the accused violates the terms of such supervision the prosecutor reinstates the untried charge and the matter proceeds as if the hiatus had not occurred.

of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." (18 U.S.C. App.) But whatever may be the breadth of the term "charges", Article III imposes obligations on the signatory parties only with respect to an "untried indictment, information or complaint." What these terms have in common is that they denote the initiation of criminal proceedings. Of course, proceedings connected with probation, including those in which alleged violations of probationary conditions are reviewed, are but a continuation of the process which began with an untried criminal accusation and resulted in a probationary sentence after conviction. It takes a rather imaginative leap in reasoning to conclude that the terms indictment, information or complaint were intended by the signatories to refer

to a state's claim that a prisoner has violated the conditions for release from a sentence imposed after trial on an indictment, information or complaint.

The Court of Appeals, by expanding the scope of Articles III and V of the Agreement to include detainers for violation of probationary sentences, has created a substantial obligation on the States. Since there is no constitutional obligation on the States to move speedily to revoke probation, Moody v. Daggett, 429 U.S. 78 (1976),[8] the States' obligations are those knowingly accepted by the States in signing the

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[8]The Third Circuit has considered and rejected the argument that a different conclusion is warranted in the situation in which two different and autonomous parole authorities are involved. United States ex rel Caruso v. United States Board of Parole, 570 F.2d 1150, 1155 (3d Cir.), cert. denied, 436 U.S. 911 (1978).

Agreement. As such, the Agreement is a contract and the question is what terms each State voluntarily and knowingly accepted to enter the Agreement.[9] As observed by this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981): "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." The States' obligations must be "unambiguous" Ibid. In this regard, it is highly illuminating in answering the question of to what did the States agree that no State court has held that the Agreement includes within its scope detainers for violation of probationary

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[9]Indeed, the preample of the Agreement concludes: "The contracting states solemnly agree that...." (18 U.S.C. App. (1976))."....

sentences.[10]

The available legislative history supports our position. The legislative history from the Congress, created when the United States adopted the Agreement, explains that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." H.Rep.No. 91-1018, p. 2 (1970); S. Rep. No. 91-1356, p. 2. (1970), reprinted in 1970 United States Code, Congressional and Administrative News 4864. Of course, allegations that the conditions of probation have been violated are not criminal charges. That same legislative history notes further that "the enactment of this legislation would

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[10]See: Note 5, supra.

afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." Ibid. This legislative history, which does not mention detainers for charges of violation of probationary sentences, reveals a concern which only could relate to new criminal charges; there is no constitutional "speedy trial right" to disposition of such violation detainers. See, e.g., Moody, supra.[11]

The commentary relied upon by the district court and the Court of Appeals (Pet. App. 10, 28) in turn merely suggests in general terms the

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[11]In Moody the Court did not have before it the question of whether the potential of adverse actions by two different and antonomous parole authorities warranted a different conclusion and expressly reserved determination of this question. 429 U.S., at 88.

various possible sources of detainers and is not an attempt to define precisely the scope of the Agreement. If indeed the Agreement was to encompass every conceivable type of detainer, the inevitable conclusion is that the qualifying phrase "any untried indictment, information, or complaint" is surplusage. An interpretation which renders a portion of a statute plainly redundant should be avoided. Bell v. New Jersey, 461 U.S. 773, 788-789 (1983). Therefore, amici submit that neither the language of the Agreement nor the available legislative history supports the conclusion that probation parole violation detainers are within its scope.[12]

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[12]One State, Kentucky, has amended the language of the Agreement to specifically include detainers for violations of probation and parole. Kentucky

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Furthermore, the Court of Appeals failed to consider all of the relevant policy considerations when it concluded

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FOOTNOTE CONTINUED

Revised Statutes, Section 440.455 Enact. Acts 1976, Ch. 211 §1. That amendment provides:

> Interstate agreement to apply to detainers based on affidavits and warrants charging violation or probation and parole--Commonwealth of Kentucky is a party to the interstate agreement on detainers and shall be deemed to have contracted with each state joining therein an amendment to said interstate agreement in the form substantially as follows:
>
> Amendment to the interstate agreement on detainers concerning detainers based on violations of the terms of probation and parole (1) This amendment shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same. (2) All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or resolved affidavits and warrants charging violations of the terms of probation and parole.

As no other State has enacted such an amendment, its provisions have never become effective.

that an early hearing on a parole violation charge necessarily benefits the prisoner. To the contrary it can be assumed safely that a probationer who has been convicted of an offense resulting in new incarceration will have his probation revoked.[13] There is no reason to believe that replacing a detainer for potential violation with a detainer for a found violation will benefit the prisoner during his current imprisonment. The sentence imposed frequently will be for a range of time rather than a specific determinate time period so that certainty as to the specific date of release is not materially advanced. It is also likely that given the unknowns of possible future future good behavior

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[13]The new conviction alone is conclusive on the question of whether a violation has occurred. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

by the violator and the fact that the most recent factor to be considered is the new conviction, the period imposed will be the longest sentence permitted. As explained in Moody, in the context of a parole revocation hearing:

> Finally, there is a practical aspect to consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a "prediction as to the ability of the individual to live in society without committing antisocial acts." In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions...a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate--at the expiration of the parolee's intervening sentence.

429 U.S., at 89.

The statutory construction which the Court of Appeals candidly admits is an "analysis of the legislative history ...based on policy...," Pet. App. 13, n. 9, is neither interpretation of the statutory language as controlled by a clearly expressed legislative intent nor a proper historical analysis of the problem sought to be remedied by the Agreement. To "expand[] the scope", Ibid., of the Agreement is a legislative function not a judicial one and the Court of Appeals lacked the authority to do so. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 31 (1973).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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